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No. _____

In The
Supreme Court of the United States
October Term, 1992

MIDWEST PRIDE, III, INC.,
MICHAEL F. MORAN, STANLEY E. MILLER,
DONALD BUMGARTNER, FRANK E. FINDO,
Petitioners,

vs.

STATE OF OHIO, EX REL. ROBERT L. BECKER,
Respondent.

Petition For A Writ Of Certiorari To The Ohio Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is a state statute which authorizes the closure as a public nuisance of "any place in or upon which lewdness ... is conducted, permitted, continued or exists" unconstitutional under the Fourteenth Amendment due to vagueness as several courts, including the highest courts of Iowa, New Mexico and Michigan have held or does such a statute give adequate warning of its proscriptions so as to satisfy due process of law as several other courts, including the highest courts of Virginia, Wisconsin and, in this case, Ohio have determined?

II. Is such a statute unconstitutional under the Fourteenth Amendment due to vagueness if, as construed by the highest court in the state, it authorizes the closure as a public nuisance of "any place in or upon which [public sexual activity

that is reprehensible or disgusting] is conducted, permitted, continued or exists"?

LIST OF PARTIES

The parties to the proceeding in the Ohio Supreme Court were Midwest Pride III, Inc., also identified in that court and the lower courts as Pride III, Inc.; Michael F. Moran; Stanley E. Miller; Donald Bumgartner and Frank E. Findo as appellants, and the State of Ohio ex rel. Robert L. Becker as appellee. Defendants Jack Ryan and Lions Den Adult Book Store were dismissed as parties by the Licking County, Ohio Court of Common Pleas. (A. 17a, 24a.)[1]

There are no parent or subsidiary companies of Midwest Pride, III, Inc.

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[1] References to "A." are to the appendix to this petition.

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Petition For A Writ of Certiorari To
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PETITION FOR A WRIT OF CERTIORARI

Midwest Pride III, Inc.; Michael F. Moran; Stanley E. Miller; Donald Bumgartner and Frank E. Findo, petitioners, pray that a writ of certiorari issue to review the judgment of the Ohio Supreme Court entered in this case on November 18, 1992.

OPINIONS BELOW

The order of the Ohio Supreme Court dismissing the appeal for the reason that no substantial constitutional question exists is set forth at A. 1a. The opinions of the Court of Appeals for Licking County, Ohio, Fifth Appellate District are set forth at A. 3a and A. 45a. The Amended Nunc Pro Tunc Entry and Nunc Pro Tunc Entry of the Court of Common Pleas of Licking County, Ohio are set forth at A. 17a and A. 31a, respectively. The various judgment entries and orders of the Court of Common Pleas of Licking County, Ohio are set forth at A. 49a, A. 52a, A. 54a and A. 61a.

JURISDICTION

The opinion and judgment of the Court of Common Pleas of Licking County, Ohio were entered on February 26, 1992. A. 17a. The opinion and judgment of the Court of

Appeals for Licking County, Ohio were entered on June 15, 1992. A. 3a. The judgment of the Ohio Supreme Court was entered on November 18, 1992. A. 1a. This Court has jurisdiction to review the judgment rendered by the highest court of a state where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution by writ of certiorari pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution and the Ohio Public Nuisance Statutes, Chapter 3767 and its predecessors are reprinted in the Appendix to this petition at A. 67a - A. 84a.

STATEMENT OF THE CASE

This case is one of at least twelve known to petitioners in which the State of Ohio has employed its Public Nuisance Statute to shut down a bookstore on the grounds that "lewdness" was being conducted on the premises. Ohio's Public Nuisance Statute, the constitutionality of which is at direct issue here, can find its clone in at least 19 other jurisdictions. Thus, while review of the constitutionality of Ohio's Public Nuisance Act obviously holds great importance for the State of Ohio, the issues raised regarding the constitutionality of Ohio's law present the opportunity for illumination of a confused and conflicted area of the law far beyond Ohio's borders. The urgency of the need for direction from this Court draws its intensity from the fact that concededly protected expression has been and continues

to be completely suppressed under the guise of vague and ill-defined statutory language--not confined to a single state, but repeated in state legislation in numerous other jurisdictions.

The specific facts presented here follow. On December 11, 1990, the prosecutor of Licking County, Ohio filed a nuisance action against the petitioners seeking to close down the adult bookstore which they operated and seeking to impose additional sanctions upon the individuals. The initiation of the action was the result of a six-month investigation during which thirteen undercover agents from the prosecutor's office, sheriff's office and local police department made 42 entries into the bookstore, observed a small number of patrons engage in masturbation while viewing films or videos at the bookstore and collected samples of semen from the viewing

area within the store and from the dumpster behind the store.

The store's physical layout consisted of a retail area and three viewing areas. The retail area was positioned at the entrance of the store. From the retail area, adult patrons could enter three areas for the purpose of viewing sexually oriented videos and films: the Big Screen T.V. area, the Preview Booth area and the 25¢ booth area. The 7-10 patrons observed engaged in masturbation by the law enforcement authorities were in one of these three viewing areas.

During the course of the investigation, not a single arrest was made of those patrons who were observed engaged in the act of masturbation. And despite the store's longstanding and posted policy of prohibiting such misconduct, at no time did any law enforcement officer approach the

ownership or store employees about such problems. Rather, the law enforcement officials chose instead to initiate a nuisance action against petitioners on December 11, 1990.

It is important to note that the bookstore under siege was in the business of distributing expressive materials which are protected by the First Amendment. The store possessed a retail area where books, magazines and other expression could be purchased as well as several different on-site viewing areas where videos and films could be watched. At no time during the course of the proceedings was it alleged that any of the materials offered for sale or view at the bookstore were obscene. Indeed, the prosecutor disavowed any suggestion that the nuisance action involved obscenity as that term is constitutionally defined.

The petitioners filed a number of motions including one for dismissal of the action on the ground that the nuisance statute was unconstitutional for vagueness. The court denied the motions.

After a two-day hearing which the parties stipulated would constitute the record for both the temporary and permanent injunction, the trial court ultimately rendered a final judgment declaring the bookstore a nuisance, and as authorized by §§ 3767.03, 3767.04 Ohio Revised Code, imposed a permanent injunction ordering the abatement of the nuisance, entered an order closing the store for one year,[2] and

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[2] The petitioners sought release from the closure order as allowed by statute. The trial court denied the request for release. This denial was separately appealed and ultimately reversed by the appellate court but not until the store had been closed for nearly one year. The prosecutor sought review of the appellate court's reversal on the release issue in the Ohio Supreme Court. The Ohio Supreme Court

entered an order mandating forfeiture of all personalty used in conducting the nuisance. In fashioning its forfeiture order, the court ordered confiscated all films and videos without any regard for whether they were actually involved with the conduct that allegedly constituted the nuisance or not.

In finding that the bookstore constituted a nuisance as defined by § 3767.01 Ohio Rev. Code,[3] the court premised its determination solely on the ground that "it [was] a place in or upon which lewdness was

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declined to accept that case for review.

[3] The statute defines nuisance as: "any place in or upon which lewdness, assignation or prostitution is conducted, permitted, continued or exists...." § 3767.01 Ohio Rev. Code (Page's 1988). Ohio's nuisance statutes were amended since this action was prosecuted to make several non-substantive changes. See §§ 3767.03-06, 3767.11 Ohio Rev. Code (Page's Supp. March 1992). The definition of nuisance and the relevant closure procedures and penalties remain completely unchanged.

conducted, permitted, continued and existed." (Amended Nunc Pro Tunc Entry, Court of Common Pleas, Licking County, Ohio, February 26, 1992, A. 17a.) It is important to note that at the time the alleged "lewdness" took place on petitioners' premises, no authoritative construction of that term had been rendered by the Ohio Supreme Court. And if the petitioners had reviewed the legislative history of Ohio's Public Nuisance Act to determine the meaning of lewdness, they would have quite logically concluded that lewdness specifically referred to acts connected with prostitution and houses of ill-fame. See, Chapter 1091, Sec. The Public Statutes at Large of the State of Ohio, Vol. I, p. 1666 (Curwen)(1853); Section 7025, The Revised Statutes of the State of Ohio, 1880 (Vol. II); Sec. 13031 General Code of Ohio (1888); Sec. 6212-1,

General Code of Ohio (1917). A. 80a-83a. State v. Davis, 11 Ohio Op. 2d 28, 30-31 (Cinn. Muni. 1959).

Petitioners appealed the trial court's various orders to the Court of Appeals for Licking County. On appeal, they challenged the statute as unconstitutional specifically on the ground that the term, lewdness, was so vague and ambiguous that it failed to afford the average person "a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

During the pendency of the appeal, the Ohio Supreme Court accepted for review an appeal by a bookstore which had been closed under the nuisance statute in a neighboring county. State ex rel. Rear Door Bookstore v. Tenth District Court of Appeals, 63 Ohio St.3d 354, 588 N.E.2d 116 (1992). The Ohio

Supreme Court affirmed the decision of the court of appeals and adopted the opinion rendered below by the appellate court. Id. at 355, 588 N.E.2d at 118. The court of appeals in Rear Door Bookstore decided, inter alia, that although the term, lewdness, was subject to varying interpretation, "a meaning [could] be ascertained which put [] a person of ordinary intelligence on notice of what actions are prohibited." Id. at 359, 588 N.E.2d at 121. The court defined lewdness as "a public sexual activity that is reprehensible or disgusting in nature." Id. at 360, 588 N.E.2d at 122.

The court of appeals below overruled petitioners' vagueness challenge to the statutory term, lewdness, on authority of the Rear Door Bookstore decision rendered by the Ohio Supreme Court. (Opinion of the Court of Appeals for Licking County, Ohio,

June 15, 1992, A. 3a, 6a.)

Petitioner sought review before the Ohio Supreme Court requesting it to reconsider, among other issues, its ruling regarding the constitutionality of the term, lewdness, in the nuisance statute.

The Ohio Supreme Court declined review on November 18, 1992.

REASONS FOR GRANTING THE WRIT

This case presents an issue that is at once simple and complex: can the term, lewdness, as used in a statute to define a public nuisance, withstand constitutional scrutiny? The question posed here is quite different than that presented in Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986). This Court determined in Arcara that a public nuisance statute can be constitutionally applied to close an establishment disseminating protected expression

based on misconduct wholly unconnected with the expression. The issue raised here, however, involves a question not raised in Arcara: whether the term, lewdness, as used in a public nuisance statute, to identify conduct which subjects a bookstore to the risk of closure and confiscation of its expressive inventory is too vague and ambiguous to comport with due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution?

Courts among the numerous jurisdictions with nearly identical nuisance statutes employing the term, lewdness, to define a public nuisance, have reached conflicting answers. A number of courts have determined that lewdness, standing alone, is unconstitutionally vague, State ex rel. Faches v. N.D.D., Inc., 228 N.W.2d 191 (Iowa 1975); State v. Morley, 63 N.M. 267, 317 P.2d 317 (1957); City of Shreveport v.

Wilsons, 145 La. 906, 83 So. 186 (1919); State ex rel. Wayne Cty. Pros. Atty. v. Levenburg, 280 N.W.2d 810 (Mich. 1979), while others have found the term sufficiently precise to provide notice of the outlawed conduct under due process standards. College Art Theatres, Inc. v. State ex rel. DeCarlo, 476 So.2d 40 (Ala. 1985); State v. Panno, 151 Wis.2d 819, 447 N.W.2d 74 (1989); Commonwealth v. Croatan Books, Inc., 228 Va. 383, 323 S.E.2d 86 (1984).

Foremost among the states that have addressed the meaning and constitutional sufficiency of the term is Ohio. Ohio has served as the bloody battleground for local prosecutors who have utilized Ohio's public nuisance statute as a weapon to shut down local adult bookstores on the ground that "lewdness" has been occurring on the premises. Since December 1989, ten bookstores and/or arcades have been closed

completely or partially as a direct result of a civil nuisance action initiated for the purpose of eliminating "lewdness." Several others are presently at risk of closure pending final adjudication. The issue is one of immediate and compelling concern and has engendered a distinct conflict among those states who have addressed it.

Petitioners respectfully request this Court to accept this case for review.

I. THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO PROVIDE IMPORTANT AND NECESSARY GUIDANCE TO NUMEROUS STATE COURTS CONFRONTED WITH THE TASK OF EVALUATING THE CONSTITUTIONALITY OF THE TERM, **LEWDNESS**, APPEARING IN STATE PUBLIC NUISANCE STATUTES IN AT LEAST TWENTY JURISDICTIONS.

Shortly after the turn of the century, a wave of state legislation was enacted which was designed to eradicate houses of

prostitution which had begun to pepper large urban areas in increasing numbers. State v. Morley, 63 N.M. 267, 272, 317 P.2d 317, 320 (1957). Red light abatement acts--better known as public nuisance acts--became the law on the books of numerous states of the union. Ohio's current public nuisance act, Chapter 3767, the statute under which the bookstore in the instant case was ordered closed, had its genesis in those laws designed to abate prostitution. Approximately twenty other jurisdictions have statutes nearly identical to Ohio's public nuisance statute.

Ohio's statute defines a nuisance as "any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued or exists...." § 3767.02 Ohio Rev. Code (Page's 1988). As noted, the same definition can be found in public nuisance statutes on a state by

state basis nationwide.

Chapter 3767 imposes extremely harsh consequences for those who have been deemed by a judge to have allowed a nuisance to exist on their premises. The entire business can be closed for one year, all property used in connection with the nuisance can be confiscated, and fines can be individually imposed. §§ 3767.06, 3767.08, 3767.09 Ohio Rev. Code (Page's 1988).

As written, the statute is focused on the owners of the premises, not on those actually engaging in the defined misconduct. Thus, the public nuisance statute imposes a duty on owners and operators of business establishments to exercise control over their patrons' behavior. To avoid potential closure and confiscation of property under § 3767.02 Ohio Rev. Code, the business person must take appropriate

measures to assure that the patrons visiting his or her establishment do not engage in "lewdness." Thus, at the fulcrum of the legal issue presented here is the statutory term, lewdness.

That the use of the term, lewdness in the public nuisance statute presents an opportunity for considerable ambiguity and confusion, was acknowledged by the Ohio Supreme Court in State ex rel. Rear Door Bookstore v. Tenth District Court of Appeals, 63 Ohio St. 3d 354, 588 N.E.2d 116 (1992). The Rear Door Bookstore opinion noted:

> Our research indicates that twenty states have enacted statutes similar or identical to R.C. 3767.01 (Ohio's Public Nuisance statute). Each state declares a place in which "lewdness, assignation or prostitution" occurs to be a nuisance susceptible to closure. The interpretations of these statutes by the various state courts have run the gamut from unconstitutional for vagueness, State ex rel. Clemene v. Teneca, Inc., 265 N.W.2d 909 (Iowa

> 1978) to constitutional and understandable, Commonwealth v. Croatan Books, Inc., 228 Va. 383, 323 S.E.2d 86 (1984)... In summary, decisions from our sister states can be cited to support almost any point of view.

Id. at 359, 588 N.E.2d at 121 (emphasis added).

As the Supreme Court of Ohio acknowledged in the Rear Door Bookstore opinion, the courts of the various states with identical or similar public nuisance statutes have reached varied conclusions regarding the term, lewdness, which are at direct odds with one another. The courts of Iowa, New Mexico, Louisiana and Michigan have found the term, lewdness, standing by itself to be unconstitutionally vague. State ex rel. Faches v. N.D.D., Inc., 228 N.W.2d 191 (Iowa 1975); State v. Morley, 63 N.M. 267, 317 P.2d 317 (1957); City of Shreveport v. Wilsons, 145 La. 906, 83 So. 186 (1919); State ex rel. Wayne Cty. Pros. Atty. v. Levenburg, 280 N.W.2d 810 (Mich.

1979).

The New Mexico Supreme Court in Morley explained:

> [T]he term "lewdness" if dissociated from "assignation or prostitution" would be too vague and indefinite to comply with the due process of law requirement of the Fourteenth Amendment....

Id. at 272, 317 P.2d at 320. The court, therefore, determined that lewdness was constitutionally required to be limited to acts in connection with assignation or prostitution. Id. at 271, 317 P.2d at 319.

Other courts have saved the constitutionality of their state's public nuisance act by construing the term, lewdness, as synonymous with obscenity--thus, invoking this Court's tri-partite definition developed in Miller v. California, 413 U.S. 15 (1973). See, e.g. State ex rel. Callahan v. Diversified Theatrical Corp., 59 Mich. App. 223, 229 N.W.2d 389 (1975).

In contrast, other courts have determined that lewdness is a term of common and accepted meaning that carries with it no constitutional deficiencies. See, College Art Theatres, Inc. v. State ex rel. DeCarlo, 476 So.2d 40 (Ala. 1985); State v. Panno, 151 Wis.2d 819, 447 N.W.2d 74 (1989); Commonwealth v. Croatan Books, Inc., 228 Va. 383, 323 S.E.2d 86 (1984). Still others are not certain exactly how to construe the term lewdness in their public nuisance acts. See, State ex rel. Dossett v. Richland Bookmart, 1990 WL 209331 (Tenn. App. 1990).

Ohio, while acknowledging that lewdness is susceptible to varying interpretation, has attempted to fashion its own definition of that term based on "common usage and common understanding." In 1992, after the instant action had been initiated and after the petitioners' bookstore had been ordered

closed, the Ohio Supreme Court accepted for review a case challenging the use of the term, lewdness, in Ohio's Public Nuisance Statute on vagueness and overbreadth grounds under the federal Constitution. State, ex rel. Rear Door Bookstore v. Tenth District Court of Appeals, 63 Ohio St. 3d 354, 588 N.E.2d 116 (1992). Specifically, on review before the Ohio Supreme Court in Rear Door Bookstore was the determination that the term, lewdness, as used in Ohio's public nuisance statute, was not a legal term of art, but rather was a word of common usage that was subject to definition by dictionary which was sufficient to "put [] a person of ordinary intelligence on notice of what actions [were] prohibited." Id. at 358-59, 588 N.E.2d at 121. The appellate court had consulted a number of varied dic-

tionary definitions of the term, lewd,[4] and from them, crafted a definition of its own not found in any of the dictionaries cited. The court concluded that lewdness "describes a public sexual activity that is reprehensible or disgusting in nature." Id. at 360, 588 N.E.2d at 122.

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[4] The court wrote:

> Webster defines "lewd" as: "* * * sexually unchaste or licentious * * * lascivious * * * inciting to sensual desire or imagination * * *." Webster's Third New International Dictionary (1986) 1301. The Oxford English Dictionary gives a similar definition and cites Chaucer for first using the word in popular literature as early as 1386. "Lascivious" is defined by Webster as" "* * * inclined to lechery: lewd, lustful * * * tending to arouse sexual desire * * *." Webster's, supra, at 1274. The Oxford Dictionary defines "lascivious" as: "[i]nclined to lust, lewd, wanton." The Oxford English Dictionary (1989) 666.

Id. at 358, 588 N.E.2d at 121.

Without any explanatory comment, the Ohio Supreme Court affirmed the appellate court's decision on authority of the appellate court's own decision below. It is this definition--not found in any dictionary--which Ohio has seized upon to define lewdness for the purpose of identifying public nuisances subject to closure. As such, Ohio has set on foot a dangerous instrument subject to abuse by law enforcement authorities.

By way of background, it is important to note that the Rear Door Bookstore case itself was one of the many nuisance actions, such as the instant case, brought under Ohio's nuisance statute by a local prosecutor seeking to shut down an area adult bookstore. Specifically, within one year, eight such actions had been instituted on the grounds that "lewdness" was occurring on the premises of the bookstore, thereby

invoking the civil statutory procedures leading to swift closure. See State of Ohio ex rel. Miller v. The Lions Den, Inc., et al., Case No. 89CV-12-9008 (Franklin Cty. Com. Pl., December 1989); State of Ohio ex rel. Miller v. Lions Den Bookstore, et al., Case No. 89CV-12-9007 (Franklin Cty. Com. Pl., December 18, 1989) aff'd in part, rev'd in part Case No. 90-AP1056 (Franklin Cty. App. 1991); State of Ohio ex rel. Miller v. Rear Door Bookstore, et al., Case No. 89CV-12-9005 (Franklin Cty. Com. Pl., December 18, 1989) aff'd Case No. 90AP-986 (Franklin Cty. App., March 21, 1991) aff'd 63 Ohio St. 3d 354 (1992); State of Ohio ex rel. Miller v. Zodiac Bookstore, et al., Case No. 89CV-12-8009 (Franklin Cty. Com. Pl., December 18, 1989); State of Ohio ex rel. Miller v. Worldwide Bookstore, Case No. 89CV-12-9011 (Franklin Cty. Com. Pl., December 18,

1989); State of Ohio ex rel. Miller v. Disco Bookstore, Inc., et al., Case No. 89CV-12-9012 (Franklin Cty. Com. Pl., December 18, 1989); State of Ohio ex rel. Miller v. Trabue Road Adult Bookstore, Case No. 89CV-12-9010 (Franklin Cty., December 18, 1989); State of Ohio ex rel. Becker v. Lions Den Bookstore, et al., Case No. 90-S-89086 (Licking Cty. Com. Pl., December 11, 1990). In each of these cases, a bookstore was shut down, the personalty seized and fines levied. All was done under the authority conferred by the public nuisance statute to enjoin and abate in a civil action premises wherein "lewdness" was conducted. Ironically, but not surprisingly, in a number of these actions, the courts employed a definition of "lewdness" quite different than that fashioned by the court in the Rear Door Bookstore case. For example, the court in State of Ohio, ex

rel. Michael Miller v. Worldwide Bookstore, et al., Case No. 89CV-12-9011, unreported decision and entry, Franklin County Court of Comm. Pl. (August 16, 1990)(Martin, J.) listed three potential definitions of lewdness--although it ruled out the first pertaining to ignorance or foolishness. Its definition of lewdness read: "(2) wickedness, evil behavior; (3) lasciviousness, lascivious behavior."

The court in State of Ohio ex rel. Michael Miller v. Zodiac Bookstore, et al., Case No. 89CV-12-9009, unreported decision, Franklin County Comm. Pl. (September 13, 1990)(Stratton, J.) derived still another definition of lewdness: "lasciviousness, licentiousness or lacking sexual restraint, gross and wanton indecency in sexual relations." This latter definition was the one utilized by the trial court below in finding that petitioners' bookstore was a

public nuisance subject to closure.

Since Rear Door Bookstore was decided, several more actions have been filed or adjudicated--all against adult bookstores and all on the ground that "lewdness" was occurring on the premises. State of Ohio ex rel. Roszmann v. Lions Den, et al., Case No. 92-0077-CIV (Fayette Cty. Com. Pl., March 13, 1992); State of Ohio ex rel. Plummer v. Lions Den, et al., Case No. 92-CV-237 (Guernsey Cty., May 22, 1992); City of Mansfield, Ohio ex rel. Konstam v. Video Visions, Inc., Case No. 92-751-D (Richland Cty. Com. Pl., December 29, 1992). Each court has now been left with the task of determining whether the conduct qualifies as "reprehensible" or "disgusting" under the definition adopted by the Ohio Supreme Court. The construction of the term, lewdness, by the court in Rear Door Bookstore has not in any way alleviated the funda-

mental vagueness problems presented by that term. As discussed below, lewdness defined as "public sexual activity that is reprehensible or disgusting in nature" leaves wide open to guess by a citizen what conduct subjects his or her premises subject to closure by the state and even more open to arbitrary and capricious enforcement by local authorities.

While the actual meaning of lewdness and the activities it encompasses are patently unclear, what is clear is that the courts of numerous states having public nuisance statutes identical to Ohio's are in need of guidance from this Court. For, while at least twenty states including Ohio have public nuisance statutes similar if not identical to one another, the state court decisions evaluating the constitutionality of the term, lewdness, against vagueness standards under the Fourteenth Amendment

have, in the words of the Ohio Supreme Court, "run the gamut" and "can be cited to support almost any point of view." Id. at 359, 588 N.E.2d at 121.

This case presents this Court with the opportunity to supply sorely needed constitutional interpretation of a statutory term creating confusion and conflicting results in a number of state jurisdictions.

II.

THE OHIO SUPREME COURT'S DETERMINATION THAT **LEWDNESS,** WHEN DEFINED AS "PUBLIC SEXUAL ACTIVITY THAT IS REPREHENSIBLE OR DISGUSTING" IS NOT UNCONSTITUTIONALLY VAGUE UNDER THE FOURTEENTH AMENDMENT STANDS IN DIRECT CONFLICT WITH THIS COURT'S LONG LINE OF DECISIONS ADDRESSING DUE PROCESS STANDARDS OF VAGUENESS.

The term, lewdness, as defined by the Ohio Supreme Court as "public sexual activity that is reprehensible or disgusting in nature," Rear Door Bookstore, 63 Ohio St. 3d at 360, 588 N.E.2d at 122, is

unconstitutionally vague. Therefore, the public nuisance statute must be struck down as void for vagueness.

The rule of law has long been established that a statute, and especially a statute that imposes harsh sanctions for its violation, is unconstitutional on its face if its provisions are so vague and imprecise that persons of ordinary intelligence must either guess at its meaning or differ as to its application. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).

The language here at issue, lewdness as defined as "public sexual activity that is reprehensible or disgusting," is squarely akin to language that has been ruled by this Court to be unconstitutionally vague. In Giacco v. State of Pennsylvania, 382

U.S. 399 (1966), this Court reviewed a state statute that allowed a jury to assess costs against a criminal defendant upon his acquittal. In arguing that the statute was not violative of Due Process on vagueness grounds, the State emphasized that the statute had been sufficiently narrowed by judicial interpretation to allow such assessment only where the defendant's conduct was not unlawful but was "reprehensible in some respect," or "not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal distribution of costs." Id. at 404. This Court found the "so-called court-created conditions and standards" to be unconstitutionally vague. The Court observed:

> It would be difficult if not impossible for a person to prepare a defense against such general abstract charges as "misconduct," or "reprehensible conduct."

Id. Yet that is precisely what is demanded of those named as defendants in a nuisance action in the State of Ohio.

Thus, the very language at issue here was ruled by this Court to run afoul of due process standards. Language with similar ambiguity and imprecision has been ruled by this Court to invalidate legislation on vagueness grounds. See, Coates v. Cincinnati, 402 U.S. 611 (1971)("Conduct annoying to persons passing by" determined to be unconstitutionally vague); Gelling v. State of Texas, 343 U.S. 960 (1952)("of such character as to be prejudicial to the best interests of the people of said City" determined to be unconstitutionally vague); Superior Films, Inc. v. Department of Education, 346 U.S. 587 (1954) ("moral, educational, amusing or harmless" determined to be unconstitutionally vague).

In Grayned, this Court explained the constitutional foundation of the void-for-vagueness doctrine:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing a fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked."

Id. at 107-08 (footnotes omitted)(quoting Baggett v. Bullitt, 377 U.S. 360, 372, 84 S. Ct. 1316, 1322, 12 L.Ed.2d 377 (1964); Cramp v. Board of Public Instruction, 368 U.S. 278, 287, 82 S. Ct. 275, 280, 7 L.Ed.2d 285 (1961)).

Vague statutory language offends due process not only by failing to provide citizens with adequate notice of what conduct is prohibited, but further by failing to place appropriate restraint on those applying the law so as to prevent "arbitrary and erratic arrests and convictions." Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972). See also Kolender v. Lawson, 461 U.S. 352, 357 (1983); Colautti v. Franklin, 439 U.S. 379, 390 (1979); Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966). This Court in Kolender noted that the "principal element" of the void-for-vagueness doctrine is "'the requirement

that a legislature establish minimal guidelines to govern law enforcement." Kolender, 461 U.S. at 358 (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)). For without such minimal guidelines, those in charge of enforcing the law are granted complete discretion in determining what conduct does or does not violate the statute at issue. Id.

Vagueness concerns are further magnified, as here, where they implicate expression and have the potential to inhibit the exercise of First Amendment rights. See Grayned, 408 U.S. at 108; Colautti, 439 U.S. at 391.

Application of these well-entrenched principles of due process yield but one conclusion: Chapter 3767, Ohio's Public Nuisance Statute, must be struck down on vagueness grounds.

First, the statutory term, lewdness, is a near perfect example of vague language rendering a statute indecipherable to a citizen seeking to figure out what conduct it outlaws. The statutory term, lewdness, gives the citizen no guideposts to steer between lawful and unlawful conduct. The vagueness of the statutory language is exacerbated by the fact that the nuisance statute is focused at the owner or operator of a business establishment. It is not his own conduct that he must seek to conform to the law, but rather the statute threatens penalty based on the conduct of the business' patrons. Thus, the owner or operator is charged with the duty of controlling patron conduct. As such, he is charged with the duty of making the subjective judgment of what sexual activity constitutes "public sexual activity that is reprehensible or disgusting in nature" and charged with the

duty of taking measures to assure that it is not "conducted, permitted, continued or exists" on his premises. If he guesses wrong, his business will be closed and the personalty seized.

Second, what constitutes "reprehensible" or "disgusting" conduct plumbs the depths of subjectivity. See, Giacco, 382 U.S. at 404. Rather than providing narrowing definitional guidelines and restraints on arbitrariness, the terms chosen by the Ohio Supreme Court to define, lewdness only serve to amplify its ambiguity and imbue the term, lewdness, with a degree of subjectivity that is constitutionally impermissible. At what point does public sexual activity become disgusting and reprehensible? And whose point of view should be adopted in reaching such conclusion? What qualifies as "disgusting" and "reprehensible" is largely a function of an

individual's likes and dislikes. The statute as written and construed invites arbitrary and erratic enforcement and imposition of harsh sanctions.

Lastly, the statutory vagueness at issue here must be assessed against stricter standards because of its potential to inhibit the exercise of First Amendment rights and its susceptibility to use by law enforcement authorities and prosecutors against those like petitioners who are in the business of disseminating speech. Grayned, 408 U.S. at 108; Colautti v. Franklin, 439 U.S. 379 (1979). "Precision of regulation must be the touchstone" with respect to such laws. NAACP v. Button, 371 U.S. 415, 438 (1963).

As is readily seen from the numerosity of nuisance actions filed against adult bookstores by the State of Ohio (see petition at pp. 26, 27, 29, 30), those estab-

lishments disseminating sexually explicit expression have been targeted by the government for closure under the state nuisance statute. Because of the amorphous language defining nuisance, the nuisance statute can be and has been used arbitrarily and discriminatorily against those establishments distributing expression which local law enforcement authorities find offensive. The very evil addressed by this Court in Kolender, has been sanctioned by the Ohio Supreme Court in Rear Door Bookstore.

CONCLUSION

For these reasons, petitioners respectfully request that this Court review the case at bar to address the constitutional issues raised by the Ohio Supreme Court's construction of lewdness in Ohio's Public Nuisance Act.

Respectfully submitted,

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THE SUPREME COURT OF OHIO

1992 TERM

To wit: November 18, 1992

STATE OF OHIO, ex rel. Robert L. Becker, Appellee,	:	Case No. 92-1612
v.	:	
LIONS DEN ADULT BOOK STORE, et al.;	:	E N T R Y
MIDWEST PRIDE III, INC., et al., Appellants.	:	

Upon consideration of the motion for an order directing the Court of Appeals for Licking County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by Berkman, Gordon, Murray & Palda

(Court of Appeals No. 92CA16)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS
FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO, ex rel. Robert L. Becker, Prosecuting Attorney for Licking County	:	JUDGES: Hon. Norman J. Putman, P.J. Hon. John R. Milligan, J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
v.	:	
	:	Case No. 92-CA-16
LIONS DEN ADULT BOOK STORE, et al.;	:	O P I N I O N
Defendants-Appellants	:	(Filed June 15, 1992)

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas Case No. 90-S-89096

JUDGMENT: Affirmed in Part Reversed in Part

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellants
ROBERT L. BECKER Prosecuting Attorney 20 South Second Street Fourth Floor	J. MICHAEL MURRAY LORRAINE R. BAUM-GARDNER JEREMY A. ROSENBAUM

Newark, Ohio 43055

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nating Building
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44113

Appellants assign seven errors:

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT ERRED IN FAILING TO DISMISS THE COMPLAINT AND IN REFUSING TO ENTER JUDGMENT IN APPELLANTS' FAVOR ON THE GROUND THAT THE PROSECUTION FAILED TO ALLEGE AS WELL AS PRESENT ANY EVIDENCE OF LEWDNESS, A PARTICULARIZED STATUTORY TERM SPECIFICALLY REFERRING TO ACTS IN CONNECTION WITH PROSTITUTION, OR IN THE ALTERNATIVE, ON THE GROUND THAT THE STATUTORY TERM, LEWDNESS, IF INTERPRETED TO MEAN SOMETHING ELSE, RENDERED CHAPTER 3767 OHIO REV. CODE UNCONSTITUTIONALLY VAGUE AND OVER BROAD.

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT ERRED IN FAILING TO DISMISS THE COMPLAINT AND IN REFUSING TO ENTER JUDGMENT IN APPELLANTS' FAVOR, WHERE THE ONLY EVIDENCE INTRODUCED AGAINST APPELLANTS THAT A SMALL PERCENTAGE OF PATRONS ACTED IN A MANNER CONTRARY TO THE BOOKSTORE'S RULES AND POLICIES, WAS INSUFFICIENT, AS A MATTER OF LAW, TO IMPOSE LIABILITY ON APPELLANTS UNDER CHAPTER 3767.

ASSIGNMENT OF ERROR NO. III

THE TRIAL COURT ERRED IN UPHOLDING THE CONSTITUTIONALITY OF CHAPTER 3767 AS APPLIED TO THIS CASE AND IN GRANTING RELIEF IN THE FORM OF THE CLOSURE OF THE BOOKSTORE AND THE FORFEITURE OF EXPRESSIVE MATERIALS, WHERE THE ONLY EVIDENCE INTRODUCED AGAINST APPELLANTS WAS THAT IN RESPONSE TO VIEWING NON-OBSCENE, CONSTITUTIONALLY PROTECTED MATERIAL AT THE BOOKSTORE, SOME PATRONS ENGAGED IN MASTURBATION.

ASSIGNMENT OF ERROR NO. IV

THE TRIAL COURT ERRED IN ORDERING THE FORFEITURE OF ALL FILMS LOCATED AT THE STORE AND THE MEANS TO EXHIBIT THOSE EXPRESSIVE MATERIALS, WHERE NO SHOWING WAS MADE AS TO WHICH, IF ANY, FILMS WERE VIEWED AT THE TIME SOME PATRONS ENGAGED IN MASTURBATION.

ASSIGNMENT OF ERROR NO. V

THE TRIAL COURT ERRED IN FAILING TO GRANT RELEASE FROM ITS ORDER OF CLOSURE, WHERE THE OWNER OF THE REAL PROPERTY AT WHICH THE "NUISANCE" WAS FOUND TO HAVE EXISTED APPEARED BEFORE THE COURT AND PROFFERED TO UNDERTAKE TO PAY COSTS, TO POST A BOND IN THE FULL VALUE OF SAID PROPERTY AND TO ASSURE THAT THE NUISANCE WOULD NOT REOCCUR.

ASSIGNMENT OF ERROR NO. VI

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE SEIZED FROM THE INTERIOR OF THE LIONS DEN ADULT BOOK STORE, WHERE THAT EVIDENCE WAS SEIZED WITHOUT A WARRANT BY UNDERCOVER OFFICERS WHO ACTED OVER AN EXTENDED PERIOD OF TIME WITH AN INVESTIGATORY

PURPOSE AND NOT AS CUSTOMERS WOULD BE EXPECTED TO ACT.

ASSIGNMENT OF ERROR NO. VII

THE TRIAL COURT ERRED IN FAILING TO ENTER JUDGMENT IN FAVOR OF LIONS DEN ADULT BOOK STORE, REAL PROPERTY AND JACK RYAN.

I.

Appellants first argue that the statutory term "lewdness" is defined in conjunction with prostitution, and the State failed to produce any evidence of lewdness as so defined.

R.C. 3767.01 refers to "lewdness, assignation, or prostitution." By using the word "or," the legislature gave a separate and distinct identity to each of the terms in R.C. 3767.01, and a nuisance exists by virtue of conduct constituting any one of the three mutually exclusive terms. State, ex rel. Rear Door Book Store v. Tenth District Court of Appeals (1992), 63 Ohio St. 3d 354, 362, 588 N.E.2d 116, 118. There-

fore, lewdness is not defined as conduct connected with prostitution.

Appellants argue that if not defined in connection with prostitution, the term "lewdness" is vague and overbroad.

The overbreadth doctrine applies where the challenged law would have a chilling effect on constitutionally protected free speech. Dombrowski v. Pfister (1965), 380 U.S. 479.

Appellants argue that the conduct (masturbation) which resulted in the sanctions in the instant case is constitutionally protected under the First Amendment because it was linked to conduct protected by the First Amendment (watching non-obscene adult movies).

This argument is without merit. The court's judgment was predicated on sexual activity occurring on the premises, which is not protected expression. Rear Door

Book Store, 63 Ohio St.3d at 357, 588 N.E. 2d at 120, citing, Arcara v. Cloud Books, Inc. (1986), 478 U.S. 697, 705. As this case does not involve protected speech, the overbreadth doctrine is not applicable.

A statute is void for vagueness if a man of common intelligence cannot ascertain what conduct is prohibited. Papachristou v. City of Jacksonville (1972), 405 U.S. 156. The term "lewdness" is not void for vagueness. Rear Door Book Store, 63 Ohio St.3d at 360, 588 N.E.2d at 122. The term describes public sexual activity that is reprehensible or disgusting in nature. Id. The meaning is sufficiently clear, and the definition supplies ample guidance to prevent arbitrary and discriminatory enforcement. Id.

The first assignment of error is overruled.

II.

Appellants argue the evidence is insufficient, because the State did not present evidence that appellants participated in maintaining the nuisance. Appellants specifically argue that the policy of the store was that masturbation was not permitted. Appellants argue that evidence that a few patrons acted in a manner contrary to store rules is insufficient as a matter of law.

R.C. 3767.02 provides:

> Any person, who uses, occupies, establishes, or conducts a nuisance, or aids or abets therein, and the owner, agent, or lessee of any interest in any such nuisance together with the persons employed in or in control of any such nuisance by any such owner, agent, or lessee is guilty of maintaining a nuisance and shall be enjoined as provided in sections 3767.03 to 3767.06, inclusive, of the Revised Code.

Four witnesses testified that upon entering the viewing areas as paying cus-

tomers, they observed persons masturbating. More than sixty exhibits revealed the presence of semen on swabs taken from the walls and floors, and on tissues, condoms, towels, and other articles taken from the store. There was evidence that a sign posted in the quarter booth area read, "Notice. We need your help. The sheriff wants to close us down. So please put your trash in the proper container. Thank you for your help. The court could conclude that regardless of the store's stated policy, appellants were aware the activity was occurring, and did nothing to abate the nuisance.

The second assignment of error is overruled.

III.

Appellants argue that R.C. 3767 was unconstitutionally applied by ordering closure of the retail portion of the store and

forfeiture of non-obscene materials.

The evidence shows that the store was operated as one unit. The store clerk at the counter made change for use in the quarter booths and collected money from patrons who wished to use the big screen TV area and preview booths. The clerk ran the equipment which exhibited films in the big screen TV and preview areas. Patrons using the preview booths selected a video from the counter area, which could be purchased from the store. Therefore, the store and the viewing areas are not separate units. Id. at 364-65, 588 N.E.2d at 125. Therefore, the court did not violate appellants' First Amendment rights by ordering forfeiture of the personal property, as the property was used in conducting the nuisance pursuant to R.C. 3767.06.

Further, appellants are free to sell non-obscene adult materials at another lo-

cation, so the closure order does not violate their First Amendment rights. Id.

The third assignment of error is overruled.

IV.

Any of the adult videos in the counter area of the store could be selected for viewing in the preview booth. Therefore, the court could conclude that all of the videos were used in conducting the nuisance regardless of which films happened to be playing on the specific occasions when masturbation was witnessed.

The fourth assignment of error is overruled.

V.

This assignment of error is rendered moot by our disposition in Licking App. No. 3755, attached to this opinion.

The fifth assignment of error is overruled.

VI

Appellants argue that the evidence seized from the store should have been suppressed, as the officers did not have a warrant.

Appellants had no expectation of privacy in the physical evidence collected from the store. The undercover officers entered appellants' place of business, which was open to any adult member of the public. Therefore, no search occurred in the constitutional sense. Id. at 364, 588 N.E.2d at 124, 125. The evidence was in plain view of anyone entering the viewing area of the store. Id. at 364, 588 N.E.2d at 125.

As to evidence seized from the dumpster in the store's parking lot, a person has no expectation of privacy in garbage deposited for collection in an area open to public inspection. California v. Greenwood (1988), 486 U.S. 35. An organization has

no reasonable expectation of privacy in a dumpster located on its parking lot. State v. American Veterans Post No. 250 (1987), 37 Ohio App.3d 108, 524 N.E.2d 191, syllabus.

Further, the exclusionary rule generally does not apply in civil cases, and does not extend to this case. Rear Door Book Store, 63 Ohio St.3d at 364, 588 N.E.2d at 125.

The sixth assignment of error is overruled.

VII

The February 26, 1992, judgment of the trial court dismisses the action against Jack Ryan and Lions Den Adult Book Store, rendering that portion of this assignment of error moot.

As to the action against the real property, both parties per their briefs agree that the case should have been dismissed as

to the real property.[1] The trial court found the proceeding against the real property to be in rem, and issued judgment against the real property.

This was not a proper proceeding for an in rem judgment. R.C. 3767.02 expressly applies to any person. R.C. 3767.01 defines person to include an individual, corporation, association, partnership, trustee, lessee, agent, or assignee. Therefore, an action does not lie against the property. Further, the owner of the real property was dismissed from the action.

The assignment of error is sustained to the extent it assigns error in failure of the trial court to dismiss the action against the real property.

The judgment of the Licking County Common Pleas court is affirmed in part and re-

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[1] Both briefs were filed before the 2/26/92 order of the trial court.

versed in part. The instant action is vacated against the real property located at 6762 Hebron Road, Heath, Ohio, and affirmed as to all other appellants.

Putman, P.J. and

Hoffman, J. concur.

/s/ Norman J. Putnam
/s/ John R. Milligan
/s/ William B. Hoffman
JUDGES

JRM/emc 0525 0529 0529

IN THE COURT OF COMMON PLEAS
OF LICKING COUNTY, OHIO

STATE OF OHIO, EX REL.
ROBERT L. BECKER, PROSECUTING
ATTORNEY OF LICKING COUNTY, OHIO,
20 South Second Street, 4th Floor
Newark, Ohio 43055,

Plaintiff,

vs. Case No. 90-S-89086

LIONS DEN ADULT BOOK STORE,
a business
6762 Hebron Road
Heath, Ohio 43056,

Defendant, (Filed February 26, 1992)

and

MIDWEST PRIDE III, INC.
c/o Statutory Agent Situation Corporation
140 East Town Street
Columbus, Ohio 43215,

Defendant,

and

MICHAEL F. MORAN
3481 Glen Oaks Court
Galena, Ohio 43021,

Defendant,

and

FRANK E. FINDO
3132 N. Greystone Drive
Morgantown, West Virginia 26505,

Defendant,

and

PRIDE III, INC.
c/o Michael Moran, President
3481 Glen Oaks Court
Galena, Ohio 43021,

Defendant,

and

REAL PROPERTY,
located at 6762 Hebron Road
Heath, Ohio 43056,

Defendant,

and

STANLEY E. MILLER
101 Canal Street, Apt. 5C
Hebron, Ohio 43025,

Defendant,

and

DONALD BUMGARTNER
Rear, 450 Clarendon Street
Newark, Ohio 43055,

Defendant,

and

JACK D. RYAN
c/o Lions Den Adult Book Store
6762 Hebron Road
Heath, Ohio 43056,

Defendant.

AMENDED
NUNC PRO TUNC ENTRY

This matter came on for hearing on the 8th day of April, 1991, on plaintiff's application for a permanent injunction pursuant to Chapter 3767 of the Ohio Revised Code.

Based upon the evidence including the stipulations, the exhibits which were admitted into evidence, the arguments of counsel and the law:

1. The Court finds that a nuisance does exist at the premises known as the Lions Den Adult Book Store, 6762 Hebron Road, Heath, Licking County, Ohio, and more fully described on Plaintiff's Exhibit 5 as follows:

Situated in the City of Heath, in the County of Licking and the State of Ohio.

Being a part of Lot 2, Third Quarter, First Township, Twelfth Range of the United States Military Lands also being known as the Marie M. and Elden J. Paul property as described in Vol. 745, Page 4 of the Licking County Deed Records and being more particularly bounded and described as follows:

Beginning at a concrete monument at the southeast corner of Lot 2; thence S 89 degrees 47'54" W, 483.70 feet to a point in the centerline of State Route 79, said point being the true place of beginning of the herein described parcel. Thence S 89 degrees 47'54" W, along the south line of the aforementioned Paul property and passing an iron pin at 59.70 feet, a total distance of 368.54 feet to an iron pin, said iron pin being the southeast corner of the Mid-Ohio Warehouse Inc. property as described in Vol. 657, page 40 of the Licking County Deed Records; thence N 0 degrees, 06'27" W, 280.83 feet to an iron pin marking the Northeast corner of the aforementioned Paul property, 212.17 feet to an iron pin; thence S 38 degrees 49' E, along the Northerly line of the aforementioned Paul property and passing an iron pin at 362.07 feet, a total distance of 399.33 feet to a point in the cen-

terline of State Route 79; thence S 51 degrees 11' W, along the centerline of State Route 79, thence S 51 degrees 11' W, along the centerline of State Route 79, 68.29 feet to the place of beginning, containing 2.2685 acres.

The above description was prepared by Malcolm A. Grove, Registered Surveyor S6547 in April, 1986.

Subject to any and all easements, rights of way, conditions and restrictions of record, all legal highways, zoning ordinances, rules and regulations.

Being the same premises conveyed to First Federal Savings and Loan Association by deed recorded in Volume 80, page 134 of the Official Records of Licking County, Ohio.

Being the same premises conveyed to Gary Zinkon by deed recently left for recording.

Prior deed reference: Vol. 103, page 670 of the Official Records of Licking County, Ohio.

2. The Court finds that a nuisance exists at the location specified above because it is a place in or upon which lewdness was conducted, permitted, continued and existed.

3. The Court finds that the Lions Den Adult Book Store is a business entity operated at 6762 Hebron Road, Heath, Licking County, Ohio, by the defendant Midwest Pride III, Inc., an Ohio Corporation which holds the vendor's license to operate said business. The Court further finds that the named defendant Pride III, Inc. is the exact same entity as the defendant Midwest Pride III, Inc.

4. The Court further finds that the defendant Midwest Pride III, Inc. leased the real property upon which the business entity known as the Lions Den is situated from the property owner, Frank Findo.

5. The Court finds that at all relevant times the defendant Michael F. Moran was an officer of Midwest Pride III, Inc.

6. The Court finds that defendant Stanley E. Miller was at relevant times an employee of Midwest Pride III, Inc., and as

such was employed at the business entity known as the Lions Den Adult Book Store, 6762 Hebron Road, Heath, Ohio.

7. The Court finds that the defendant Donald Bumgartner was at relevant times an employee of Midwest Pride III, Inc. and as such was employed at the business entity known as the Lions Den Adult Book Store, 6762 Hebron Road, Heath, Ohio.

8. The Court finds that the action filed is in rem with respect to the real property located at 6762 Hebron Road, Heath, Licking County, Ohio. The real property is, therefore, proper party to this action.

9. The Court finds that no evidence was produced against the defendant Jack D. Ryan and the case is dismissed as to him.

10. The Court finds that by agreement of the parties the case is dismissed against the defendant Frank E. Findo.

11. The Court finds that the defendant Lions Den Adult Book Store is not an entity which is subject to being sued and the case is dismissed against it.

12. The Court finds that the provisions of Chapter 3767 of the Ohio Revised Code are constitutional and the defendant's Motions to Dismiss are overruled.

13. The Court finds based upon the evidence that the Lions Den Adult Book Store was operated as one unit and that the word "place" as used in R.C. 3767 et seq., therefore means the entire premises.

It is therefore ORDERED:

1. That the cause of action against the defendants Lions Den Adult Book Store, Frank E. Findo, and Jack D. Ryan is dismissed.

2. That pursuant to Ohio Revised Code 3767.02 defendants Midwest Pride III and Pride III are the owners of an interest in

the nuisance in that the corporation leases the real property and holds the vendor's license to conduct the business at 6762 Hebron Road, Heath, Ohio. As such, the corporations are guilty of maintaining the nuisance.

3. That defendant Michael F. Moran is an officer of the corporation known as Midwest Pride III, Inc., and as such has an interest in the nuisance being conducted at 6762 Hebron Road, Heath, Ohio. He is, therefore, guilty of maintaining the nuisance pursuant to Ohio Revised Code 3767.02.

4. That defendant Stanley E. Miller is a person employed at the Lions Den Adult Book Store by the defendant Midwest Pride III, Inc., and is therefore a person employed by an owner of an interest in said nuisance. Defendant Miller is, therefore, guilty of maintaining a nuisance pursuant

to Ohio Revised Code 3767.02.

5. That defendant Donald Bumgartner is a person employed at the Lions Den Adult Book Store by the defendant Midwest Pride III, Inc., and is therefore a person employed by an owner of an interest in said nuisance. Defendant Bumgartner is, therefore, guilty of maintaining a nuisance pursuant to Ohio Revised Code 3767.02.

6. That as the action is one in rem against the real property located at 6762 Hebron Road, Heath, Licking County, Ohio, judgment is granted against the following described real property as the place where a nuisance has been established:

> Situated in the City of Heath, in the County of Licking and the State of Ohio.
>
> Being a part of Lot 2, Third Quarter, First Township, Twelfth Range of the United States Military Lands also being known as the Marie M. and Elden J. Paul property as described in Vol. 745, Page 4 of the Licking County Deed Records and being more particularly

bounded and described as follows:

Beginning at a concrete monument at the southeast corner of Lot 2; thence S 89 degrees 47'54" W, 483.70 feet to a point in the centerline of State Route 79, said point being the true place of beginning of the herein described parcel. Thence S 89 degrees 47'54" W, along the south line of the aforementioned Paul property and passing an iron pin at 59.70 feet, a total distance of 368.54 feet to an iron pin, said iron pin being the southeast corner of the Mid-Ohio Warehouse Inc. property as described in Vol. 657, page 40 of the Licking County Deed Records; thence N 0 degrees, 06'27" W, 280.83 feet to an iron pin marking the Northeast corner of the aforementioned Paul property, 212.17 feet to an iron pin; thence S 38 degrees 49' E, along the Northerly line of the aforementioned Paul property and passing an iron pin at 362.07 feet, a total distance of 399.33 feet to a point in the centerline of State Route 79; thence S 51 degrees 11' W, along the centerline of State Route 79, thence S 51 degrees 11' W, along the centerline of State Route 79, 68.29 feet to the place of beginning, containing 2.2685 acres.

The above description was prepared by Malcolm A. Grove, Registered Surveyor S6547 in April, 1986.

Subject to any and all easements, rights of way, conditions and restrictions of record, all legal

highways, zoning ordinances, rules and regulations.

Being the same premises conveyed to First Federal Savings and Loan Association by deed recorded in Volume 80, page 134 of the Official Records of Licking County, Ohio.

Being the same premises conveyed to Gary Zinkon by deed recently left for recording.

Prior deed reference: Vol. 103, page 670 of the Official Records of Licking County, Ohio.

7. Defendants Midwest Pride III, Inc., Pride III, Inc., Michael F. Moran, Stanley E. Miller, Donald Bumgartner, and the real property located at 6762 Hebron Road, Heath, Ohio, are hereby ordered to abate the nuisance and are perpetually enjoined from further maintenance thereof.

8. That the entire premises known as the Lions Den Adult Book Store is ordered closed against its use for any purpose for a period of one (1) year from April 8, 1991, unless sooner released.

9. That pursuant to Ohio Revised Code 3767.08 a tax of $300.00 is imposed against defendants Midwest Pride III, Inc., Pride III, Inc., Michael F. Moran, Stanley E. Miller, Donald Bumgartner and the real property located at 6762 Hebron Road, Heath, Ohio.

10. The Sheriff of Licking County shall immediately seize and remove from the premises all electronic video equipment and screens used to exhibit adult films. He shall likewise seize and remove all adult films from the premises. Pursuant to R.C. 3767.06 the Sheriff is directed to sell said property in the manner provided for the sale of chattels under execution.

11. Costs are assessed against defendants Midwest Pride III, Inc.; Pride III, Inc.; Michael F. Moran; Stanley E. Miller; Donald Bumgartner; and the real property located at 6762 Hebron Road, Heath, Ohio.

/s/ Jon R. Spahr
Judge Jon R. Spahr

IN THE COURT OF COMMON PLEAS
OF LICKING COUNTY, OHIO

STATE OF OHIO, EX REL.
ROBERT L. BECKER, PROSECUTING
ATTORNEY OF LICKING COUNTY, OHIO,
20 South Second Street, 4th Floor
Newark, Ohio 43055,

Plaintiff,

vs. Case No. 90-S-89086

LIONS DEN ADULT BOOK STORE,
a business
6762 Hebron Road
Heath, Ohio 43056,

Defendant, (Filed December 11, 1991)

and

MIDWEST PRIDE III, INC.
c/o Statutory Agent Situation Corporation
140 East Town Street
Columbus, Ohio 43215,

Defendant,

and

MICHAEL F. MORAN
3481 Glen Oaks Court
Galena, Ohio 43021,

Defendant,

and

FRANK E. FINDO
3132 N. Greystone Drive
Morgantown, West Virginia 26505,

Defendant,

and

PRIDE III, INC.
c/o Michael Moran, President
3481 Glen Oaks Court
Galena, Ohio 43021,

Defendant,

and

REAL PROPERTY,
located at 6762 Hebron Road
Heath, Ohio 43056,

Defendant,

and

STANLEY E. MILLER
101 Canal Street, Apt. 5C
Hebron, Ohio 43025,

Defendant,

and

DONALD BUMGARTNER
Rear, 450 Clarendon Street
Newark, Ohio 43055,

Defendant,

and

JACK D. RYAN
c/o Lions Den Adult Book Store
6762 Hebron Road
Heath, Ohio 43056,

Defendant.

NUNC PRO TUNC ENTRY

This matter came on for hearing on the 8th day of April, 1991, on plaintiff's application for a permanent injunction pursuant to Chapter 3767 of the Ohio Revised Code.

Based upon the evidence including the stipulations, the exhibits which were admitted into evidence, the arguments of counsel and the law:

1. The Court finds that a nuisance does exist at the premises known as the Lions Den Adult Book Store, 6762 Hebron Road, Heath, Licking County, Ohio, and more fully described on Plaintiff's Exhibit 5 as follows:

Situated in the City of Heath, in the County of Licking and the State of Ohio.

Being a part of Lot 2, Third Quarter, First Township, Twelfth Range of the United States Military Lands also being known as the Marie M. and Elden J. Paul property as described in Vol. 745, Page 4 of the Licking County Deed Records and being more particularly bounded and described as follows:

Beginning at a concrete monument at the southeast corner of Lot 2; thence S 89 degrees 47'54" W, 483.70 feet to a point in the centerline of State Route 79, said point being the true place of beginning of the herein described parcel. Thence S 89 degrees 47'54" W, along the south line of the aforementioned Paul property and passing an iron pin at 59.70 feet, a total distance of 368.54 feet to an iron pin, said iron pin being the southeast corner of the Mid-Ohio Warehouse Inc. property as described in Vol. 657, page 40 of the Licking County Deed Records; thence N 0 degrees, 06'27" W, 280.83 feet to an iron pin marking the Northeast corner of the aforementioned Paul property, 212.17 feet to an iron pin; thence S 38 degrees 49' E, along the Northerly line of the aforementioned Paul property and passing an iron pin at 362.07 feet, a total distance of 399.33 feet to a point in the cen-

terline of State Route 79; thence S 51 degrees 11' W, along the centerline of State Route 79, thence S 51 degrees 11' W, along the centerline of State Route 79, 68.29 feet to the place of beginning, containing 2.2685 acres.

The above description was prepared by Malcolm A. Grove, Registered Surveyor S6547 in April, 1986.

Subject to any and all easements, rights of way, conditions and restrictions of record, all legal highways, zoning ordinances, rules and regulations.

Being the same premises conveyed to First Federal Savings and Loan Association by deed recorded in Volume 80, page 134 of the Official Records of Licking County, Ohio.

Being the same premises conveyed to Gary Zinkon by deed recently left for recording.

Prior deed reference: Vol. 103, page 670 of the Official Records of Licking County, Ohio.

2. The Court finds that a nuisance exists at the location specified above because it is a place in or upon which lewdness was conducted, permitted, continued and existed.

3. The Court finds that the Lions Den Adult Book Store is a business entity operated at 6762 Hebron Road, Heath, Licking County, Ohio, by the defendant Midwest Pride III, Inc., an Ohio Corporation which holds the vendor's license to operate said business. The Court further finds that the named defendant Pride III, Inc. is the exact same entity as the defendant Midwest Pride III, Inc.

4. The Court further finds that the defendant Midwest Pride III, Inc. leased the real property upon which the business entity known as the Lions Den is situated from the property owner, Frank Findo.

5. The Court finds that at all relevant times the defendant Michael F. Moran was an officer of Midwest Pride III, Inc.

6. The Court finds that defendant Stanley E. Miller was at relevant times an employee of Midwest Pride III, Inc., and as

such was employed at the business entity known as the Lions Den Adult Book Store, 6762 Hebron Road, Heath, Ohio.

7. The Court finds that the defendant Donald Bumgartner was at relevant times an employee of Midwest Pride III, Inc. and as such was employed at the business entity known as the Lions Den Adult Book Store, 6762 Hebron Road, Heath, Ohio.

8. The Court finds that the action filed is in rem with respect to the real property located at 6762 Hebron Road, Heath, Licking County, Ohio. The real property is, therefore, proper party to this action.

9. The Court finds that no evidence was produced against the defendant Jack D. Ryan and the case is dismissed as to him.

10. The Court finds that by agreement of the parties the case is dismissed against the defendant Frank E. Findo.

11. The Court finds that the defendant Lions Den Adult Book Store is not an entity which is subject to being sued and the case is dismissed against it.

12. The Court finds that the provisions of Chapter 3767 of the Ohio Revised Code are constitutional and the defendant's Motions to Dismiss are overruled.

13. The Court finds based upon the evidence that the Lions Den Adult Book Store was operated as one unit in R.C. 3767 et seq., and therefore means the entire premises.

It is therefore ORDERED:

1. That the cause of action against the defendants Lions Den Adult Book Store, Frank E. Findo, and Jack D. Ryan is dismissed.

2. That pursuant to Ohio Revised Code 3767.02 defendants Midwest Pride III and

Pride III are the owners of an interest in the nuisance in that the corporation leases the real property and holds the vendor's license to conduct the business at 6762 Hebron Road, Heath, Ohio. As such, the corporations are guilty of maintaining the nuisance.

3. That defendant Michael F. Moran is an officer of the corporation known as Midwest Pride III, Inc., and as such has an interest in the nuisance being conducted at 6762 Hebron Road, Heath, Ohio. He is, therefore, guilty of maintaining the nuisance pursuant to Ohio Revised Code 3767.02.

4. That defendant Stanley E. Miller is a person employed at the Lions Den Adult Book Store by the defendant Midwest Pride III, Inc., and is therefore a person employed by an owner of an interest in said nuisance. Defendant Miller is, therefore,

guilty of maintaining a nuisance pursuant to Ohio Revised Code 3767.02.

5. That defendant Donald Bumgartner is a person employed at the Lions Den Adult Book Store by the defendant Midwest Pride III, Inc., and is therefore a person employed by an owner of an interest in said nuisance. Defendant Bumgartner is, therefore, guilty of maintaining a nuisance pursuant to Ohio Revised Code 3767.02.

6. That as the action is one in rem against the real property located at 6762 Hebron Road, Heath, Licking County, Ohio, judgment is granted against the following described real property as the place where a nuisance has been established:

> Situated in the City of Heath, in the County of Licking and the State of Ohio.
>
> Being a part of Lot 2, Third Quarter, First Township, Twelfth Range of the United States Military Lands also being known as the Marie M. and Elden J. Paul property as described in Vol.

745, Page 4 of the Licking County Deed Records and being more particularly bounded and described as follows:

Beginning at a concrete monument at the southeast corner of Lot 2; thence S 89 degrees 47'54" W, 483.70 feet to a point in the centerline of State Route 79, said point being the true place of beginning of the herein described parcel. Thence S 89 degrees 47'54" W, along the south line of the aforementioned Paul property and passing an iron pin at 59.70 feet, a total distance of 368.54 feet to an iron pin, said iron pin being the southeast corner of the Mid-Ohio Warehouse Inc. property as described in Vol. 657, page 40 of the Licking County Deed Records; thence N 0 degrees, 06'27" W, 280.83 feet to an iron pin marking the Northeast corner of the aforementioned Paul property, 212.17 feet to an iron pin; thence S 38 degrees 49' E, along the Northerly line of the aforementioned Paul property and passing an iron pin at 362.07 feet, a total distance of 399.33 feet to a point in the centerline of State Route 79; thence S 51 degrees 11' W, along the centerline of State Route 79, thence S 51 degrees 11' W, along the centerline of State Route 79, 68.29 feet to the place of beginning, containing 2.2685 acres.

The above description was prepared by Malcolm A. Grove, Registered Surveyor S6547 in April, 1986.

Subject to any and all easements, rights of way, conditions and restrictions of record, all legal highways, zoning ordinances, rules and regulations.

Being the same premises conveyed to First Federal Savings and Loan Association by deed recorded in Volume 80, page 134 of the Official Records of Licking County, Ohio.

Being the same premises conveyed to Gary Zinkon by deed recently left for recording.

Prior deed reference: Vol. 103, page 670 of the Official Records of Licking County, Ohio.

7. Defendants Midwest Pride III, Inc., Pride III, Inc., Michael F. Moran, Stanley E. Miller, Donald Bumgartner, and the real property located at 6762 Hebron Road, Heath, Ohio, are hereby ordered to abate the nuisance and are perpetually enjoined from further maintenance thereof.

8. That the entire premises known as the Lions Den Adult Book Store is ordered closed against use for any purpose for a

period of one (1) year unless sooner released.

9. That pursuant to Ohio Revised Code 3767.08 a tax of $300.00 is imposed against defendants Midwest Pride III, Inc., Pride III, Inc., Michael F. Moran, Stanley E. Miller, Donald Bumgartner and the real property located at 6762 Hebron Road, Heath, Ohio.

10. That all matters pertaining to the seizure, removal or sale of personal property and contents used in conducting the nuisance are taken under advisement pending briefs and argument from counsel.

11. Costs are assessed against defendants Midwest Pride III, Inc.; Pride III, Inc.; Michael F. Moran; Stanley E. Miller; Donald Bumgartner; and the real property located at 6762 Hebron Road, Heath, Ohio.

/s/ Jon R. Spahr
Judge Jon R. Spahr

Copies to:

Robert L. Becker, Esq.
Licking County Prosecutor
20 South Second Street, Newark OH 43055

J. Michael Murray, Esq.
Attorney for Defendants
2121 The Illuminating Building
55 Public Square, Cleveland, OH 44113

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO, ex rel. Robert L. Becker, Prosecuting Attorney for Licking County	:	JUDGES: Hon. Norman J. Putman, P.J. Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
-vs-	:	
	:	Case No. CA-3659
LIONS DEN ADULT BOOK STORE, et al.;	:	O P I N I O N
Defendants-Appellants	:	(Filed December 10, 1991)

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas Case No. 90-S-89096

JUDGMENT: Dismissed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellants
ROBERT L. BECKER Prosecuting Attorney 20 South Second Street Fourth Floor	J. MICHAEL MURRAY LORRAINE R. BAUM-GARDNER JEREMY A. ROSENBAUM

Newark, Ohio 43055

BERKMAN, GORDON, MURRAY and PALDA
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113

PUTNAM, P.J.

The document filed in the Court of Common Pleas of Licking County, Ohio, on April 26, 1991, styled FINAL JUDGMENT ENTRY is void for vagueness for the following reasons:

1. The style names no sui juris entity as defendant.

2. The sui juris identity of the "Lions Den Adult Book Store" is not set forth as either a corporation, an individual or partnership, or in any other sub juris capacity.

3. No individual defendant subject to the order is named in the entry. A judgment that goes outside its four corners to identify a person subject to its terms is void

for vagueness.

4. No land is described in the entry as being subject to closure.

5. The defendant Ryan is not named at all, either as being convicted or exonerated.

This document being void for vagueness, there is no judgment in this case.

Gwin, J. and
Hoffman, J. concur.

/s/ Norman J. Putnam
/s/ W. Scott Gwin
/s/ William B. Hoffman
JUDGES

IN THE COURT OF APPEALS
FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO, ex rel. Robert L. Becker, Prosecuting Attorney for Licking County	:	
Plaintiff-Appellee	:	JUDGMENT ENTRY
-vs-	:	
	:	CASE NO. CA-3659
LIONS DEN ADULT BOOK STORE, et al.;	:	(Filed December 10, 1991)
Defendants-Appellants	:	

For the reasons stated in the Memorandum-Opinion on file, this appeal is dismissed for want of jurisdiction, no final appealable order.

/s/ Norman J. Putnam
/s/ W. Scott Gwin
/s/ William B. Hoffman
JUDGES

IN THE COMMON PLEAS COURT

LICKING COUNTY, OHIO

State of Ohio, ex rel.,
Robert L. Becker, Prosecuting
Attorney for Licking County, Ohio

Plaintiff

-vs- Case No. 90-S-89086

Lions Den Adult Book Store, et al.,

Defendants (Filed April 26, 1991)

* *

FINAL JUDGMENT ENTRY

* *

This matter came on for hearing on the 8th day of April, 1991, on plaintiff's application for a permanent injunction pursuant to Chapter 3767 of the Ohio Revised Code.

Based upon the record including the stipulations, the exhibits which were admitted into evidence, the arguments of counsel and the law:

1. The Court finds that a nuisance does exist at the premises known as the Lion's Den Adult Book Store, 6762 Hebron Road, Heath, Licking County, Ohio.

2. The Court finds that a nuisance exists at that location because it is a place in or upon which lewdness was conducted, permitted, continued and existed.

3. The Court finds that all of the named defendants except Frank Findo are guilty of maintaining the nuisance and are subject to the provisions of Chapter 3767 of the Ohio Revised Code.

4. The Court finds that the provisions of Chapter 3767 are constitutional and that defendants' Motions to Dismiss are overruled.

5. The Court finds that the Lions Den Adult Book Store was operated as one unit and that the word "place" therefore means the entire premises.

It is therefore ORDERED:

1. All named defendants with the exception of Frank Findo are hereby ordered to abate the nuisance and are perpetually enjoined from further maintenance thereof.

2. That the entire premises known as the Lions Den is ordered closed against its use for any purpose for a period of one (1) year unless sooner released.

3. That pursuant to Section 3767.08 of the Ohio Revised Code a tax of three hundred dollars ($300.00) is imposed against all named defendants except Frank Findo.

4. That all matters pertaining to the seizure, removal or sale of personal property and contents issued in conducting the nuisance is taken under advisement pending briefs and argument from counsel.

5. Costs assessed against defendants.

/s/ Jon R. Spahr
Judge Jon R. Spahr

IN THE COURT OF COMMON PLEAS
OF LICKING COUNTY, OHIO

State of Ohio, ex rel.,
Robert L. Becker, Prosecuting
Attorney for Licking County, Ohio

Plaintiff

-vs- Case No. 90-S-89086

Lions Den Adult Book Store, et al.,

Defendants (Filed May 7, 1991)

JUDGMENT ENTRY

This matter came on for consideration of plaintiff's Motion pertaining to the removal of all personal property and contents used in conducting the nuisance at the Lions Den Adult Book Store.

The plaintiff's Motion is hereby Granted.

It is ORDERED that the sheriff of Licking County shall immediately seize and remove from the premises all electronic video equipment and screens used to exhibit adult

films.

It is further ORDERED that the sheriff of Licking County shall immediately seize and remove from the premises all adult films located on the premises.

It is ORDERED that the sheriff of Licking County shall keep all the equipment and films seized pursuant to this Order at a secure location and shall not dispose of them until further order of this court.

/s/ Jon R. Spahr
JON R. SPAHR, JUDGE
Court of Common Pleas
Licking County, Ohio

IN THE COURT OF COMMON PLEAS
OF LICKING COUNTY, OHIO

State of Ohio, ex rel.,
Robert L. Becker, Prosecuting
Attorney for Licking County, Ohio

Plaintiff,

-vs- Case No. 90-S-89086

Lions Den Adult Book Store, et al.,

Defendants. JUDGMENT ENTRY
(Filed April 24, 1991)

****

This cause came on for further hearing on the application of Frank Findo, the owner of the real estate involved in this case, pursuant to section 3767.04 of the Ohio Revised Code requesting that the Court release the closure order as to said real estate.

The owner of the real estate, Frank Findo, appeared and testified under oath that he was the owner of real estate, that he was a stockholder in the corporation

that operated the Lions Den Adult Book Store, that he would pay the costs incurred in the action, that he would file a bond in the full value of the property and that he would not permit further nuisance upon the premises..

The Court further finds that the premises are leased by Frank Findo to the defendant, operator of the bookstore, and that said lease is still in existence and has not been cancelled. The Court further finds that the owner, Frank Findo, testified that he purchased the premises for $80,000.00 in 1986 but the Court makes a further finding that there was no appraisal of the premises and no expert testimony as to the value of the premises.

The Court further finds that there was no testimony specifically indicating that individuals would be monitoring the premises to prevent the nuisance, that there

was no showing of any specific measures to be taken to ensure that the nuisance would not resume, that the evidence submitted as to the value of the premises was insufficient for this Court to make a finding of the full value of the property for purposes of a bond, that the applicant, Frank Findo, did not demonstrate to this Court's satisfaction evidence that the nuisance would not resume, that since the lease is still in effect the owner, Frank Findo, can show no irreparable harm or damage by reason of the closure and further that the Court is not satisfied as to the good faith of the applicant.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by this Court that the application for the release of the closure order be, and hereby is DENIED for the above reasons.

IT IS FURTHER ORDERED that plaintiff shall prepare a final entry granting a per-

manent injunction and closure order in accordance with the Court's previous findings.

/s/ Jon R. Spahr
JON R. SPAHR, JUDGE
Court of Common Pleas
Licking County, Ohio

Copies to:

Robert L. Becker, Esq.,
Prosecuting Attorney
Court House, Newark, OH 43055

J. Michael Murray, Esq., and
Jeremy A. Rosenbaum, Esq.
Counsel for Defendants
2121 The Illuminating Building
55 Public Square, Cleveland, OH 44113

IN THE COMMON PLEAS COURT
LICKING COUNTY, OHIO

State of Ohio, ex rel.,
Robert L. Becker, Prosecuting
Attorney for Licking County, Ohio

Plaintiff

-vs- Case No. 90-S-89086

Lions Den Adult Book Store, et al.,

Defendants (Filed April 8, 1991)

* *

E N T R Y

* *

This matter came on for hearing on the 8th day of April, 1991, on plaintiff's application for a permanent injunction pursuant to Chapter 3767 of the Ohio Revised Code.

Based upon the record including the stipulations, the exhibits which were admitted into evidence, the arguments of counsel and the law:

1. The Court finds that a nuisance does exist at the premises known as the Lion's Den Adult Book Store, 6762 Hebron Road, Heath, Licking County, Ohio.

2. The Court finds that a nuisance exists at that location because it is a place in or upon which lewdness was conducted, permitted, continued and existed.

3. The Court finds that all of the named defendants and (sic) are subject to the provisions of Chapter 3767 of the Ohio Revised Code.

4. The Court finds that the provisions of Chapter 3767 are constitutional and that defendants' Motions to Dismiss are overruled.

5. The Court finds that the Lions Den Adult Book Store was operated as one unit and that the word "place" therefore means the entire premises.

It is therefore ORDERED:

1. That the entire premises known as the Lions Den is ordered closed against its use for any purpose for a period of one (1) year unless sooner released.

2. That pursuant to Section 3767.08 of the Ohio Revised Code a tax of three hundred dollars ($300.00) is imposed against all named defendants except Frank Findo.

3. That all matters pertaining to the seizure, removal or sale of personal property and contents issued in conducting the nuisance is taken under advisement pending briefs and argument from counsel.

5. Costs assessed against defendants.

/s/ Jon R. Spahr
JON R. SPAHR, JUDGE

IN THE COMMON PLEAS COURT
LICKING COUNTY, OHIO

State of Ohio, ex rel.,
Robert L. Becker, Prosecuting
Attorney for Licking County, Ohio

Plaintiff

-vs- Case No. 90-S-89086

Lions Den Adult Book Store, et al.,

Defendants (Filed March 11, 1991)

* *

O R D E R

* *

This matter came on for hearing on plaintiff's application for a Temporary Injunction. All parties were represented by counsel at said hearing.

After consideration of the sworn testimony, exhibits, stipulations and arguments of counsel, the Court finds by clear and convincing evidence that a nuisance exists at and in those parts of the Lion Den Adult

Book Store known as the "Quarter Booth" area, the "Preview Booth" area, and the "Big Screen TV" area. Said nuisance exists because of the lewd conduct occurring therein.

Therefore, it is ORDERED, pursuant to ORC 3767.04, that the following parts of the Lions Den Adult Book Store, 6762 Hebron Road, Licking County, Heath, Ohio, be enjoined against its use for the purposes of viewing, exhibiting or showing adult videos or films:

1. The twenty (20) separate and individual video viewing booths in the "Quarter Booth" area of the building.

2. The two (2) separate "Preview Booths."

3. The "Big Screen T.V." area.

This Order shall remain in effect until the Court's Final decision on plaintiff's application for a permanent injunction.

Violation of this Order shall be dealt with according to law.

The Restraining Order previously issued shall remain in effect for the period of time this injunction order remains in effect.

/s/ Jon R. Spahr
Jon R. Spahr, Judge
Common Pleas Court
Licking County, Ohio

IN THE COURT OF COMMON PLEAS
OF LICKING COUNTY, OHIO

State of Ohio, ex rel.,
Robert L. Becker, Prosecuting
Attorney for Licking County, Ohio

Plaintiff

-vs- Case No. 90-S-89086

Lions Den Adult Book Store, et al.,

Defendants (Filed December 11, 1990)

RESTRAINING ORDER

Application for temporary injunction having been made by plaintiff and application for ex parte restraining order also having been filed, it is ORDERED:

1. That defendants and all other persons are restrained from removing or in any manner interfering with the personal property and contents of the Lions Den Adult Book Store, 6762 Hebron Road, Heath, Licking County, Ohio, until the decision of this Court granting or refusing the tempo-

rary injunction and until further order of this Court.

2. That the Sheriff of Licking County, Ohio, or his designee and/or the Chief of Heath Police Department or his designess shall serve a certified copy of this order with any person in charge of said premises and shall post certified copies of this order in conspicuous places at or upon one or more principal doors or entrances to such premises.

3. That the Sheriff of Licking County, Ohio, or his designee and/or the Chief of Heath Police Department or his designee shall forthwith make and return into this Court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance.

4. The Lions Den Adult Book Store, through any employee present at the time of the inventory, shall cooperate and assist

by providing any and all keys necessary to unlock any place or thing at which or in which is or may be located any personal property used in conducting or maintaining such nuisance.

ANY VIOLATION OF THIS ORDER IS CONTEMPT OF COURT. WHERE SUCH ORDER IS POSTED ANY MUTILATION OR REMOVAL OF THE ORDER WHILE IT IS IN FORCE IS CONTEMPT OF COURT.

/s/ Jon R. Spahr
Judge
Licking County Common Pleas Court

Ohio Revised Code
(Page's 1988)

§ 3767.01 Definitions.

As used in all sections of the Revised Code relating to nuisances:

(A) "Place" includes any building, erection, or place or any separate part or portion thereof or the ground itself;

(B) "Person" includes any individual, corporation, association, partnership, trustee, lessee, agent, or assignee;

(C) "Nuisance" means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, or glass slides either in negative or positive form designed for exhibition by projection on a screen are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose. This chapter shall not affect any newspaper, magazine, or other publication entered as second class matter by the post-office department.

Ohio Revised Code
(Page's 1988)

§ 3767.02 Nuisance.

Any person, who uses, occupies, establishes, or conducts a nuisance, or aids or abets therein, any the owner, agent, or lessee of any interest in any such nuisance together with the persons employed in or in control of any such nuisance by any such owner, agent, or lessee is guilty of maintaining a nuisance and shall be enjoined as provided in sections 3767.03 to 3767.06, inclusive, of the Revised Code.

Ohio Revised Code
(Page's 1988)

§ 3767.03 Abatement of nuisance; bond.

Whenever a nuisance exists, the attorney general, the prosecuting attorney of the county in which such nuisance exists, or any person who is a citizen of such county may bring an action in equity in the name of the state, upon the relation of such attorney general, prosecuting attorney, or person, to abate such nuisance and to perpetually enjoin the person maintaining the same from further maintenance thereof. If such action is instituted by a person other than the prosecuting attorney, or attorney general, the complainant shall execute a bond to the person against whom complaint is made, with good and sufficient surety to be approved by the court or clerk thereof, in the sum of not less than five hundred dollars, to secure to the party enjoined the damages he may sustain if such action is wrongfully brought, not prosecuted to final judgment, or is dismissed, or is not maintained, or if it is finally decided that the injunction ought not to have been granted. The party thereby aggrieved by the issuance of such injunction shall have recourse against said bond for all damages suffered, including damages to his property, person, or character and including reasonable attorney's fees incurred by him in making defense to said action.

Ohio Revised Code
(Page's 1988)

§ 3767.04 Procedure in injunction action.

The action, provided in section 3767.03 of the Revised Code, shall be brought in the court of common pleas of the county in which the property is located. At the commencement of the action a verified petition alleging the facts constituting the nuisance shall be filed in the office of the clerk of the court of common pleas.

After the filing of the petition, application for a temporary injunction may be made to the court or a judge thereof who shall grant a hearing within ten days after the filing. Where such application for a temporary injunction is made, the court or judge thereof may, on application of the complainant, issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist until the decision of the court or judge granting or refusing such temporary injunction and until the further order of the court thereon. The restraining order may be served by handing to and leaving a copy of such order with any person in charge of such place or residing therein, or by posting a copy thereof in a conspicuous place at or upon one or more of the principal doors or entrances to such place, or by both such delivery and posting. The officer serving such restraining order shall forthwith make

and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance. Any violation of such restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof, while the same remains in force, is a contempt of court, provided such posted order contains therein a notice to that effect.

A copy of the complaint, together with a notice of the time and place of the hearing of the application for a temporary injunction, shall be served upon the defendant at least five days before such hearing. If the hearing is then continued at the instance of any defendant, the temporary writ as prayed shall be granted as a matter of course. If upon hearing the allegations of the petition are sustained to the satisfaction of the court or judge, the court or judge shall issue a temporary injunction without additional bond restraining the defendant and any other person from continuing the nuisance. If at the time of granting a temporary injunction, it further appears that the person owning, in control, or in charge of the nuisance so enjoined had received five days' notice of the hearing and unless such person shows to the satisfaction of the court or judge that the nuisance complained of is abated, or that such person proceeded forthwith to enforce his rights under section 3767.10 of the Revised Code, the court or judge shall forthwith issue an order closing the place against its use for any purpose of lewdness, assignation, or prostitution until final decision is rendered on the application for a permanent injunction. Such

order shall also continue in effect for such further period the restraining order above provided if already issued, or, if not so issued, shall include such an order restraining for such period the removal or interference with the personal property and contents located therein. Such restraining order shall be served and the inventory of such property shall be made and filed as provided in this section. The owner of any real or personal property closed or restrained may appear between the filing of the petition and the hearing on the application for a permanent injunction and, upon payment of all costs incurred and upon the filing of a bond by the owner of the real property with sureties to be approved by the clerk in the full value of the property to be ascertained by the court, or, in vacation, by the judge, conditioned that such owner will immediately abate the nuisance and prevent the same from being established or kept until the decision of the court or judge is rendered on the application for a permanent injunction, then the court, or judge in vacation, if satisfied of the good faith of the owner of the real property and of innocence on the part of any owner of the personal property of any knowledge of the use of such personal property as a nuisance and that, with reasonable care and diligence, such owner could not have known thereof, shall deliver such real or personal property, or both, to the respective owners thereof, and discharge or refrain from issuing at the time of the hearing on the application for the temporary injunction any order closing such real property or restraining the removal or interference with such personal property. The release of any real or personal property, under

this section, shall not release it from any judgment, lien, penalty, or liability to which it may be subjected.

Ohio Revised Code
(Page's 1988)

§ 3767.05 Priority of action; evidence; costs.

The action, provided for in sections 3767.03 and 3767.04 of the Revised Code, shall be set down for trial at the first term of the court and shall have precedence over all other cases except crimes, election contests, or injunctions. In such action, evidence of the general reputation of the place or any admission or finding of guilt of any person under the criminal laws against prostitution, lewdness, or assignation at any such place is admissible for the purpose of proving the existence of said nuisance and is prima-facie evidence of such nuisance and of knowledge of and of acquiescence and participation therein on the part of the person charged with maintaining said nuisance. If the complaint is filed by a person who is a citizen of the county it shall not be dismissed except upon a sworn statement by the complainant and his attorney, setting forth the reason why the action should be dismissed and the dismissal approved by the prosecuting attorney in writing or in open court. If the judge is of the opinion that the action ought not to be dismissed, he may direct the prosecuting attorney to prosecute said action to judgment at the expense of the county, and if the action is continued more than one term of court, any person who is a citizen of the county, or has an office therein, or the attorney general or the prosecuting attorney, may be substituted

for the complainant and prosecute said action to judgment. If the action is brought by a person who is a citizen of the county and the court finds that there were no reasonable grounds or cause for said action, the costs may be taxed to such person. If the existence of the nuisance is established upon the trial, a judgment shall be entered which shall perpetually enjoin the defendant and another person from further maintaining the nuisance at the place complained of and the defendant from maintaining such nuisance elsewhere.

Ohio Revised Code
(Page's 1988)

§ 3767.06 Content of judgment and order.

If the existence of a nuisance is admitted or established in an action as provided in sections 3767.01 to 3767.11, inclusive, of the Revised Code, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance, and not already released under authority of the court as provided in 3767.04 of the Revised Code, and shall direct the sale of such thereof as belong to the defendants notified or appearing, in the manner provided for the sale of chattels under execution. Such order shall also require the renewal for one year of any bond furnished by the owner of the real property, as provided in section 3767.04 of the Revised Code, or, if not so furnished shall continue for one year any closing order issued at the time of granting the temporary injunction, or, if no such closing order was then issued, shall include an order directing the effectual closing of the place against its use for any purpose, and keeping it closed for a period of one year unless sooner released. The owner of any place closed and not released under bond may then appear and obtain such release in the manner and upon fulfilling the requirements provided in section 3767.04 of the Revised Code. The release of the property under this section

shall not release it from any judgment, lien, penalty, or liability to which it may be subject. Owners of unsold personal property and contents so seized must appear and claim the same within ten days after such order of abatement is made and prove innocence, to the satisfaction of the court, of any knowledge of said use thereof and that with reasonable care and diligence they could not have known thereof. Every defendant in the action is presumed to have had knowledge of the general reputation of the place. If such innocence is established, such unsold personal property and contents shall be delivered to the owner, otherwise it shall be sold as provided in this section. For removing and selling the personal property and contents, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution; and for closing the place and keeping it closed, a reasonable sum shall be allowed by the court.

CONSTITUTION OF THE UNITED STATES

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote an any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Public Statutes at Large of the State of Ohio, Volume II (Curwen) (1853)

Sec. 1. *Lessors of houses of ill-fame punished. Be it enacted, etc.*, That every house or building, situate within this State, used or occupied as a house of ill-fame, or for the purposes of prostitution, shall be held and deemed a public nuisance; and any person owning such house or building, and knowingly leasing the same, for the purpose of keeping therein a house of ill-fame, or knowingly permitting the same to be used or occupied for such purpose, or using or occupying the same for such purposes, shall for every such offense be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined in any sum not exceeding one hundred dollars, or imprisonment for a term of not less than thirty days, nor more than six months, or both, at the discretion of the court.

The Revised Statutes of the
State of Ohio (Volume II) 1880

Sec. 7025. A house or building used or occupied as a house of ill-fame, or for the purpose of prostitution, is a public nuisance; and whoever keeps a house of ill-fame, resorted to for the purpose of prostitution or lewdness, or lets a house to be so kept, or knowingly permits a house which he has let to be so kept, shall be fined not more than one hundred dollars, or imprisoned not more than six months, or both; and the court may order that the nuisance be abated. [53 v. 140, § I.]

General Code of Ohio

[NUISANCES.]

§ 6212-I. Definition of terms.--For the purpose of this act, the terms place, person, nuisance are defined as follows: place shall include any building, erection, or place or any separate part or portion thereof or the ground itself; person shall include any individual, corporation, association, partnership, trustee, lessee, agent or assignee; nuisance shall mean any place as above defined in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, and the personal property and contents used in conducting and maintaining any such place for any such purpose. (107 v. 514, § I.)

General Code of Ohio

§ 13031 OFFENSES AGAINST CHASTITY.
Tit. I, Ch. 12

Knowing house of ill-fame or harboring child therein: nuisance.

Sec. 13031. Whoever keeps a house or place of ill-fame or assignation for the purpose of prostitution or lewdness, or a house or place for persons to visit for unlawful sexual intercourse or for any other lewd, obscene or indecent purpose, or a disorderly house or place, or a place of public resort by which the peace, comfort or decency of a neighborhood is disturbed, or, as agent or owner, lets a place, building or portion thereof knowing that it is intended to be used for a purpose specified in this section, or, being the owner or agent, of such building or portion thereof, of the keeper of such house of ill-fame, prostitution or assignation where lewdness exists, keeps, harbors or employs a person over four and under sixteen years of age or allows such person to remain in or about such place of assignation or house of ill-fame, or knowingly permits a place, building or portion of a building to be so used, shall be fined not less than one hundred dollars nor more than three hundred dollars or imprisoned in the workhouse or jail not less than ninety days nor more than six months, or both. The houses, buildings, portions of buildings, and places mentioned in this section are public nuisances, and the court shall order them abated. (R.S. Sec. 7025)

CONSTITUTION OF THE UNITED STATES

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Supreme Court, U.S.
FILED
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No. 92-1375

In The

Supreme Court of the United States

October Term, 1992

MIDWEST PRIDE, III, INC., MICHAEL F. MORAN, STANLEY E. MILLER, DONALD BAUMGARTNER, FRANK E. FINDO,

Petitioners,

vs.

STATE OF OHIO, EX REL. ROBERT L. BECKER,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

REPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Is a state statute which authorizes the closure as a public nuisance of "any place in or upon which lewdness . . . is conducted, permitted, continued or exists" unconstitutional under the Fourteenth Amendment due to vagueness as several courts, including the highest courts of Iowa, New Mexico and Michigan have held or does such a statute give adequate warning of its proscriptions so as to satisfy due process of law as several other courts, including the highest courts of Virginia, Wisconsin, and, in this case, Ohio have determined?

II. Is such a statute unconstitutional under the Fourteenth Amendment due to vagueness if, as construed by the highest court in the state, it authorizes the closure as a public nuisance of "any place in or upon which [public sexual activity that is reprehensible or disgusting] is conducted, permitted, continued or exists"?

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No. 92-1375

In The

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STATE OF OHIO, EX REL. ROBERT L. BECKER,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

REPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinions of the Licking County Court of Common Pleas, the Court of Appeals for the Fifth Appellate District of Ohio and the Ohio Supreme Court's denial of petitioners' petition for certiorari are adequately set forth.

JURISDICTION

The jurisdictional statement is adequately set forth in the appendix to the petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First and Fourteenth Amendments to the United States Constitutions and the Public Nuisance Statutes of Ohio are adequately set forth in the petition and the appendix to the petition.

STATEMENT OF THE CASE

On December 11, 1990, Robert L. Becker, Prosecuting Attorney of Licking County, Ohio filed a nuisance action pursuant to Ohio Revised Code Chapter 3767 in an effort to abate the activity occurring on the premises of the Lions Den Adult Book Store located at 6762 Hebron Road, Hebron, Licking County, Ohio.

A restraining order was issued on December 11, 1990, restraining petitioners and all other persons from removing or in any manner interfering with the personal property and contents of the Lions Den Adult Book Store until further order of the court. The court further ordered that the Sheriff of Licking County, Ohio serve a certified copy of the order and post certified copies of this order on the entrances to the premises. The Sheriff was also ordered to make and return an inventory of the personal property and contents in the premises.

A temporary injunction hearing was held pursuant to statute. Respondent-Plaintiff presented evidence of sexual activity occurring on the premises. Petitioners offered no evidence. On March 11, 1991, at the conclusion of the hearing the court issued a written order enjoining the use of 20 individual booths, the two preview booths and the

big screen T.V. area for the purposes of viewing, exhibiting or showing adult videos or films because of the lewd activity occurring in those areas. The restraining order and the temporary injunction were to remain in effect until the court's final decision on respondent's application for a permanent injunction.

On April 8, 1991, after hearing further evidence, the court issued a permanent injunction finding that a nuisance existed at the premises known as the Lions Den Adult Book Store because it was a place in or upon which lewdness was conducted, permitted, continued or existed. The Court then ordered the entire premises be closed against its use for any purpose for a one year period, unless sooner released. The court held in abeyance decision on all matters pertaining to the seizure, removal or sale of personal property and contents of the store.

Two further orders of the trial court denied the property owner's motion for release of property and ordered the confiscation of all electronic video equipment and screens used to exhibit adult films, and the seizure of all adult films located on the premises.

A final judgment entry was filed April 26, 1991, wherein the court reiterated its findings and orders of April 8, 1991, perpetually enjoining all defendants except Frank Findo from further maintenance of the nuisance.

An appeal was taken to the Fifth Appellate District Court of Appeals for Ohio which was dismissed for lack of an appealable order. A *nunc pro tunc* entry was filed on December 11, 1991 and an amended *nunc pro tunc* entry was filed on February 26, 1992. An appeal to the Fifth District Court of Appeals was taken and decision was

issued on June 15, 1992, overruling petitioners' assignment of error alleging that the term lewd was unconstitutionally vague.

Petitioners filed a motion in the Ohio Supreme Court for an order directing the Court of Appeals for Licking County to certify its record and claimed an appeal as of right. The Ohio Supreme Court overruled petitioners' motion. Thereupon, petitioners filed this Petition for a Writ of Certiorari to the Ohio Supreme Court.

STATEMENT OF FACTS

The Lions Den Adult Book Store, located at 6762 Hebron Road, Heath, Licking County, Ohio, was engaged in the business of selling adult oriented video tapes and magazines as well as sexual aids and devices. The Lions Den Adult Book Store also provided on site viewing of videotapes and movies. Neither the on site viewing nor the sale or rental of movies and magazines were the basis for the nuisance action. The focus of the investigation and abatement action was the sexual activity occurring on the premises.

The interior of the building consisted of four (4) sections: the "counter area"; the "quarter booth" or "arcade" area; the "preview booth" area; and the large screen TV area.

Entry into the building was gained through an exterior door directly into the counter area. In this area was located the counter which contained a display of various

sexually-oriented paraphernalia. Adult videos and magazines lined the wall. The "on duty" clerk worked at the counter. There was no charge for admission into the counter area.

The quarter booth area consisted of twenty (20) separate viewing booths measuring three (3) feet by three (3) feet. Entry into this area was free, but once entry was made into each separate booth, a payment of one quarter was required in order to start the showing of a part of an adult film. During the investigation, investigators on several occasions obtained quarters from two clerks for use in the quarter booths.

The preview booth area consisted of two larger versions of a quarter booth. Each preview booth was approximately 4½ feet by 4½ feet. Entry into these booths required the payment of $5.00. Payment was made to the on duty clerk at the counter. The patron could then pick any film in the counter area which he would give to the clerk. The patron would then go into one of the booths and the clerk would start the selected movie. The clerk had total control over the movie. The customer could control volume only.

The large screen TV area was a mini theater. Fourteen (14) separate chairs and a four (4) seat bench seat all faced a large TV screen. Entry into this area cost $4.00. Payment was made to whichever clerk was working the counter. A full-length adult film would be shown on the big screen. The showing of the film was controlled by the clerk.

The investigation into the activities occurring at the Lions Den Adult Book Store commenced on May 29, 1990,

with a meeting between the Licking County Sheriff and the Licking County Prosecutor. The purpose of the meeting was to organize an investigation into the activity occurring in the bookstore.

The investigation consisted of the collection of evidence from a trash dumpster located in the parking lot of the Lions Den, the swabbing, with a Q-tip, of the walls of each and every video viewing booth (both the quarter and preview booths), the collection of debris found in the booths, and the observation of open acts of masturbation inside the Lions Den. The evidence collected was submitted to the Court at the temporary injunction hearing and at the permanent injunction hearing.

Specifically, the evidence collected and presented to the court at the temporary injunction hearing consisted of ten (10) used condoms, paper towels, hankies, tissues and other items. Also introduced were swabs from seven (7) separate video booths and swabs from the two (2) preview booths. All parties stipulated that this evidence was examined by a qualified expert and the examination revealed the presence of human semen on most if not all of the items.

Further evidence of sexual activity was presented to the court at the permanent injunction hearing, including seven (7) additional used condoms, more napkins, hand towels, cotton ball swabs, and swabs from thirteen (13) remaining video viewing booths. Human semen was found on most if not all of these items. In total, respondent introduced ninety-four (94) exhibits. Of these exhibits, sixty-seven (67) tested positive for human semen. There was testimony concerning a sign posted in

the premises during the course of the investigation that read:

> Notice. We need your help. The Sheriff wants to close us down. So please put your trash in the proper container. Thank you for your help.

In addition to the physical evidence noted above, respondent introduced the testimony of four (4) separate witnesses who observed open and public masturbation by patrons of the Lions Den.

SUMMARY OF RESPONDENT'S ARGUMENT

1. The sexual activity occurring in a bookstore is not protected by the First Amendment to the United States Constitution. Merely because activity occurs on premises where presumptively protected material is sold does not insulate the premises from statutory regulation.

2. Since Chapter 3767 of the Ohio Revised Code does not impinge on a constitutionally protected right, the statute can only be found facially invalid if there is no possible set of facts to which the statute can be applied. The burden is on the petitioner to prove the unconstitutionality of a state statute.

3. The provisions of the nuisance abatement statute in Ohio are civil in nature. Civil statutes are not held to the same high standards of specificity as are criminal statutes that impinge on personal freedom. Petitioners cannot be incarcerated, and the nature of the statute is equitable.

4. The term "lewd" is a common-sensical term that has an ordinary meaning to persons. The conduct of petitioners falls squarely within the prohibitions of the statute.

5. The constitutionality of a statute is presumed.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Sexual Activity Occurring In The Lions Den Adult Bookstore Is Not Protected By The First Amendment.

It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand. *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 445 U.S. 489 (1982); *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963); *United States v. Mazurie*, 419 U.S. 544 (1975). Even though petitioners attempt to turn this into a First Amendment case, the fact remains that what is at issue is sexual activity in a public place and such activity is not protected by the First Amendment. *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986).

Petitioners' allegation that the nuisance statutes are being used to completely suppress "concededly protected expression" is unsupported and is an attempt to turn this action into a First Amendment issue. This Court in *Arcara v. Cloud Books, Inc.* 478 U.S. 697 (1986), has specifically rejected this position and has stated that the closure of an

adult bookstore based on activity occurring on the premises was not unconstitutional and did not violate the First Amendment.

Petitioners attempt to mislead this Court by string citing the nuisance actions brought against adult bookstores in the State of Ohio, then making the broad statement that "In each of these cases, a bookstore was shut down, the personalty seized and fines levied." (Petitioners' Brief at p. 27.) In all of the cases cited by petitioner, with the exception of the instant case, the movies, videotapes, magazines and even the sexual aids were returned to the named defendants at the time the temporary order was issued. The personalty seized in these cases was the video equipment, chairs, and in some instances the cash registers used to collect the money for the movie rooms or booth areas. In the instant case, there was evidence that the movies were utilized in conducting or maintaining the nuisance.

Further, in each of the cases wherein a bookstore was closed, either partially allowing the retail area to remain open, or completely, the owners were free, after the expiration of the one year closure, to reopen and resume their business of selling adult materials and offering on-site viewing, providing of course they did not allow the nuisance to reoccur.

The public nuisance statutes of the Ohio Revised Code are not censorial nor do they single out bookstores dealing in "adult material" for enforcement actions. The statute does not unduly penalize speech, political or otherwise. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). However, as pointed out by petitioners, numerous adult

bookstores and the owners and agents of the bookstores were permanently enjoined from conducting, permitting, continuing or allowing lewdness, assignation or prostitution to exist. Further, numerous bookstores were closed, either completely or in part, for one year in order to abate the activity occurring on the premises. It is important to note that the masturbation and public sexual activity occurring in the Lions Den Adult Bookstore, and the activity which was sought to be restrained and abated in previous nuisance abatement acts, was identical. This activity falls squarely within the prohibitions of the statute as construed by the Supreme Court of Ohio.

Petitioners further complain that they could not know what the statute meant by lewd activity. It is again important to note that the activity sought to be abated in the instant action was identical to the activity in the subsequent nuisance abatement actions brought against other premises. Perhaps more importantly, at least one of the petitioners in the instant case, Michael Moran, was a defendant in two previous nuisance abatement actions brought in Franklin County and one nuisance abatement action in Guernsey County. The basis of those actions has been the sexual activity occurring on the premises. It appears that even when petitioners have direct knowledge of the activity a court deems to be lewd, they choose to ignore the activity and carry on business as usual.

It appears that petitioners are attempting to argue that there is selective prosecution but they failed to make this argument below and petitioners fail to present that question to this Court for review, thereby abandoning this claim. Further, petitioners presented no evidence on this claim at the trial level.

2. Since the Statute Does Not Implicate Constitutionally Protected Freedoms, The Statute As Applied and Construed by The Ohio Supreme Court Is Not Unconstitutionally Vague.

When a statute does not implicate constitutionally protected conduct, the Court should uphold the statute unless the enactment is impermissibly vague in all of its applications and so utterly void of a standard of conduct that it has no core and cannot be validly applied to any conduct. *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 445 U.S. 489, 495 (1982), *United States v. Powell*, 423 U.S. 87 (1975). Petitioners make no such showing. Indeed, petitioners are parties whose conduct is clearly proscribed and therefore cannot be heard to complain of the vagueness of the law as applied to the conduct of others. *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 445 U.S. 489, 495 (1982).

The evidence shows that four witnesses entering the viewing areas as paying customers observed persons masturbating. More than 60 exhibits presented at the trial court level, including condoms, tissues, towels, swabs taken from the walls and floors, and other articles taken from the Lions Den Book Store, tested positive for the presence of semen. A sign in the booth area read:

> Notice. We need your help. The Sheriff wants to close us down. So please put your trash in the proper container. Thank you for your help.

To sustain a facial vagueness challenge the challenger must prove that the statute is vague:

> Not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).
>
> [I]mpossible standards of specificity are not required . . . The test is whether the language of the statute conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *Jordan v. DeGeorge*, 341 U.S. 223 (1951).

The evidence before the trial court demonstrated a continuing course of conduct that must be described as that which reasonable minds would conclude exceeds the minimal guidelines established by our lawmakers governing the conduct of our citizenry. Indeed petitioners knew what activity could cause them to run afoul of the statute and attempted to hide the activity or rather to hide the evidence of the activity from law enforcement. Petitioners' vagueness argument fails.

3. Chapter 3767 of the Ohio Revised Code Is Civil In Nature and Not Held To The Same Exacting Standards of Specificity As Criminal Statutes.

The statutes in question are civil in nature, not criminal. This Court has expressed a greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 445 U.S. 489, 499 (1982). *See also, Barenblatt v.*

United States, 360 U.S. 109 (1959); *Winters v. New York*, 333 U.S. 507, 515 (1948).

4. The Term "Lewd" Is Common-sensical Term That Need Not Be Narrowly Defined.

The term "lewd" is a common-sensical term that need not be narrowly defined. This Court in *Osborne v. Ohio*, 110 S.Ct. 1691 (1990) and *Miller v. California*, 413 U.S. 15 (1973) implicitly upheld the constitutionality of the term "lewd" when this Court used the term as a plain example of what a state statute could define for regulation.

Taken within the context of the statute, the term "lewd" is sufficient to notify an ordinary person, exercising ordinary common sense, and he can sufficiently understand and comply with the statute without sacrificing the public interest. *Broadrick v. Oklahoma*, 413 U.S. 600, 608 (1973).

5. The Constitutionality of A Statute Is Presumed.

That other states have differing definitions or interpretations of similar words or phrases does not make Ohio's definition unconstitutionally vague.

States are separate sovereigns which draw their authority from their own inherent sovereignty . . . *United States v. Wheeler*, 435 U.S. 313 (1978). "Each has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses and in doing so each 'is exercising its own sovereignty, not that of the other.' " *Wheeler, supra*

at 320, quoting *United States v. Lanza*, 26 U.S. 377 (1922); *see also, Heath v. Alabama* 474 U.S. 82 (1985).

As far back as 1827 this Court has held that the burden of proving the unconstitutionality of a statute must be borne by the person challenging the statute. *Brown v. State of Maryland*, 25 U.S. 419 (1827). The statutes of the states are presumed to be constitutional:

> It is . . . a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interest of the people as a whole and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power. *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 104, 19 S. Ct. 609, 612.

Chapter 3767 of the Ohio Revised Code is entitled to the presumption of constitutionality.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal does not present issues that would warrant further review by this court. It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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